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Supreme Court, U.S.
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No. 91-1855

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ALVIN D. PEARSON, BRENDA CURTIS and CENTURY 21 PEARSON, INC. REALTORS®, an Illinois Corporation,

Petitioners,

v.

JAMES EDGAR, as Governor of the State of Illinois, and ROLAND W. BURRIS, as Attorney General of the State of Illinois,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ROLAND W. BURRIS
Attorney General, State of Illinois

ROSALYN B. KAPLAN
Solicitor General, State of Illinois

RITA M. NOVAK
Counsel of Record
ROBERT G. TOEWS
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2193

Attorneys for Respondents

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QUESTION PRESENTED

I. May Illinois forbid real estate brokers and others who solicit householders for home sales and listings to solicit those householders who have affirmatively given notice that they do not want to be solicited?

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Illinois' Anti-Solicitation Statute

Section 1(d) of "An ACT to prohibit the solicitation or inducement of sale or purchase of real estate on the basis of race, color, religion * * *" (Ill. Rev. Stat. 1991, ch. 38, ¶70-51(d) ("Paragraph 70-51(d)")) permits householders to insulate themselves from solicitations for the sale or list-

ing of their homes. Paragraph 70-51(d) prohibits a person or corporation from "solicit[ing] any owner of residential property to sell or list such residential property" after the solicitor has received notice that the owner does not desire to sell the property. Ill. Rev. Stat. 1991, ch. 38, par. 70-51(d). Specific requirements for the form and service of the notice are included in the statute. *Id.*

Paragraph 70-51(d) is found in a criminal statute aimed at preventing discriminatory real estate practices. Ill. Rev. Stat. 1991, ch. 38, par. 70-51. Subsection (a) of the statute prohibits soliciting for the sale, lease, listing or purchase of residential real estate on the basis of a loss in value of the real estate as a result of minority or other undesired individuals entering the neighborhood. Ill. Rev. Stat. 1991, ch. 38, par. 70-51(a). Subsection (b) prohibits the distribution of written material intended to induce residential property owners to sell or list their property for sale for similar discriminatory reasons. Ill. Rev. Stat. 1991, ch. 38, par. 70-51(b). Subsection (c) prohibits communicating to residents in a manner designed to create alarm on a discriminatory basis, and thereby induce the sale or listing of residential real estate. Ill. Rev. Stat. 1991, ch. 38, par. 70-51(c). Paragraph 70-51(d) adds to the above prohibitions by giving the homeowner the authority to cut off unwanted solicitations for the sale or listing of his property by asserting his right to residential privacy.

Illinois courts have reviewed Paragraph 70-51(d) twice. In 1977, the Illinois Supreme Court held that Paragraph 70-51(d) was not an unconstitutional restriction on commercial speech because of the interest in residential privacy. *People v. C. Betts Realtors, Inc.*, 66 Ill. 2d 144, 149-51, 361 N.E.2d 581, 584 (1977). The court relied heavily on *Rowan v. United States Post Office*, 397 U.S. 728

(1970). Later, the Illinois Appellate Court interpreted the term "solicit" to mean a petition "addressed to a particular individual to do a particular thing," thus distinguishing it from mass media advertising. *People v. Beaulieu Realtors, Inc.*, 144 Ill. App. 3d 580, 585, 494 N.E.2d 504, 508 (1st Dist. 1986).

Prosecutions under Paragraph 70-51(d) are limited to prosecutions of in-home solicitations. Petitioners here were prosecuted as a result of telephonic in-home solicitations. (R-80, ex. 1 at ¶7.)[1] The prosecution in *Beaulieu Realtors* was brought about as a result of flyers mailed directly to the homes of individuals who had given notice pursuant to Paragraph 70-51(d). 144 Ill. App. 3d at 585, 494 N.E.2d at 508.

Notwithstanding petitioners' statement that "good will" advertising really "does not seek to induce residents to list or sell their properties" (Petition For Writ Of Certiorari at 3-4), petitioners' examples of such advertising contain statements that could reasonably be construed as solicitations for the sale or listing of homes. (R-80, exs. 1r, 2c, 4b.) Moreover, householders could easily and reasonably interpret advertisements for open houses (R-80, exs. 1d-1f), or brochures asking if residents have already decided to sell their homes (R-80, ex. 2c), or notices "encouraging those who have decided to sell to contact the broker[ ] (*E.g.*, [R-80], exs. 4c, 4g, 4m)" as solicitations to obtain more home listings. Petition For Writ Of Certiorari at 4. Even the brochures with Thanksgiving turkey recipes and weatherstripping tips contained tear-off cards to return to the broker for those who were "considering a move." (R-80, exs. 8b, 8c.) Any concerns over the proper inter-

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[1] Respondents, as petitioners do, cite the record below as "R-____."

pretation of these advertisements are easily resolved under the Seventh Circuit's proscription that the addressees' "names must be removed from any mailing list the broker may have, and the broker must refrain from future communications to the named addressees." *Curtis v. Thompson*, 840 F.2d 1291, 1304 n.12 (7th Cir. 1988) ("*Curtis*").

Respondents submitted evidence that statutes such as Paragraph 70-51(d) are still a vital means of combatting unethical real estate practices such as blockbusting and panic peddling. (R-78, at ¶¶17-21.) Solicitation is a method used by unethical realtors to encourage block-by-block resegregation. (*Id.*, at ¶¶14, 19-20.)

Proceedings Below

Along with their complaint, petitioners filed a motion for preliminary injunction. (R-9.) The District Court denied the motion because petitioners would not succeed on the merits. (App. p. 49.)[2] The Seventh Circuit affirmed the District Court in a divided decision. *Curtis v. Thompson*, 840 F.2d 1291 (7th Cir. 1988). The majority opinion found that petitioners' complaint was insufficient as a matter of law. Judges Coffey and Eschbach agreed that

> the district court properly denied plaintiff's motion for a preliminary injunction based upon her failure to establish a reasonable likelihood of prevailing on the merits. Curtis' First Amendment right to engage in commercial speech is properly limited by the state's legitimate interest in ensuring the privacy of its citizens, an interest which is narrowly served by prohibiting the solicitation of residential property owners once they have expressed their desire to be left alone.

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[2] Respondents cite to petitioners' appendix as "App. p. ____."

840 F.2d at 1305. Judge Eschbach wrote separately to state that he found the holding in *Rowan v. United States Post Office*, 397 U.S. 728 (1970), "relevant" and "helpful," but not "dispositive." *Id.* Judge Ripple dissented because he felt that further development of the record was needed. *Id.* at 1306.

After remand, the District Court dismissed the complaint. (App. p. 9.) The Seventh Circuit again affirmed. It held that its earlier decision in *Curtis*, that plaintiff's complaint was insufficient as a matter of law, was the law of the case. (App. pp. 2-4.) Yet, the court did not ignore petitioners' substantive claims. The Seventh Circuit noted that the holdings in *Curtis* had been recently confirmed in *South Suburban Housing Center v. Greater South Suburban Board of Realtors*, 935 F.2d 868 (7th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 971 (1992) ("*South Suburban*", or collectively with *Curtis* "the Seventh Circuit decisions").

South Suburban is important to an understanding of this case. *South Suburban* involved a look at several facets of real estate marketing, including an analysis of anti-solicitation ordinances of several Illinois municipalities similar to Paragraph 70-51(d). The issues decided in *Curtis* were raised again in *South Suburban*, and *Curtis* was resoundingly affirmed in a unanimous decision:

> The Realtors' challenge to the constitutionality of the municipal non-solicitation ordinances appears to recognize that our opinion in *Curtis* conflicts with their contentions but requests a re-evaluation and reversal of the *Curtis* decision. This we decline to do.

935 F.2d at 890. In *South Suburban*, the Seventh Circuit relied on *Curtis* to find the privacy interest a valid means of restricting commercial real estate activities. The court also rejected vagueness and equal protection challenges to the anti-solicitation ordinances. *Id.* at 891-96.

REASONS FOR DENYING THE WRIT

Petitioners argue that Paragraph 70-51(d) is constitutionally infirm because it effectively strips away their commercial speech right to advertise their real estate business. In contrast to petitioners' assertions, the rulings of the Seventh Circuit are fully in tune with constitutional dictates for commercial speech. The Seventh Circuit decision in *Curtis*, which was re-examined issue by issue and expressly reaffirmed in *South Suburban*, holds that the substantial government interest in protecting residential privacy takes precedence over petitioners' right to promote their commercial activities. The Seventh Circuit decisions limit petitioners' right to contact only those householders who have affirmatively indicated that they do not want petitioners' material.

I.

"WHEN THE FUNDAMENTAL RIGHT TO PRIVACY CLASHES WITH THE RIGHT TO FREE EXPRESSION, THE INTEREST IN PRIVACY DOES NOT PLAY SECOND FIDDLE WHEN THE SPEECH IS MERELY INTENDED TO PROPOSE A COMMERCIAL TRANSACTION." *CURTIS v. THOMPSON.*

In their first argument, petitioners propose further review of this case for three reasons: (1) the Seventh Circuit decisions conflict with *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464 (6th Cir. 1991), *cert. granted*, ____ U.S. ____, 112 S. Ct. 1290 (1992); (2) Paragraph 70-51(d) is unconstitutionally vague because it does not inform realtors as to what material they are prohibited from sending to unreceptive homeowners; and (3) the purpose of the statute is really to promote racial segregation.

These concerns were properly laid to rest by the Seventh Circuit, and this case is inappropriate for further review.

A. The Decisions In *Curtis* And *South Suburban* Do Not Conflict With The Sixth Circuit's Decision In *Discovery Network* Because The Seventh Circuit Decisions Rely On The Privacy Interest To Regulate Realtors' Advertising.

Contrary to petitioners' assertion, the decisions in *Curtis* and *South Suburban* are easily reconciled with the Sixth Circuit's decision in *Discovery Network*. The Seventh Circuit decisions and *Discovery Network* involve two distinctly different situations, evident from the very first sentence in *Discovery Network*: "The case involves the constitutionality of Cincinnati's ordinance prohibiting the distribution of commercial handbills *on public property*." 946 F.2d at 465 (emphasis added). *Discovery Network* measures the right to commercial speech against a city ordinance limiting the distribution of commercial handbills from newsracks placed on public property. *Id.* In contrast, the anti-solicitation laws in *Curtis* and *South Suburban* balance the right to advertise one's business against the right of the homeowner to residential privacy. The presence of the privacy interest makes the two situations radically different and distinguishable under the First Amendment.

Illinois' strong interest in protecting residential privacy permits it to limit speech, particularly when the limitation is imposed on commercial speech. As the Seventh Circuit reasoned in *Curtis*: "[T]he state's interest in regulating expressive conduct is even greater where the expressive conduct threatens to (or does) impinge on the exercise of equally important constitutional rights (e.g., privacy) of others." 840 F.2d at 1300 n.8. The Seventh

Circuit then succinctly concluded: "When the fundamental right to privacy clashes with the right of free expression, the interest in privacy does not play second fiddle when the speech is merely intended to propose a commercial transaction." *Id.* at 1300 (footnote omitted).

This strong support for the interest in residential privacy is readily seen in this Court's jurisprudence. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (holding that the interest in preserving residential privacy is sufficient to uphold a complete ban on picketing—a "core" type of First Amendment speech—because "[t]here simply is no right to force speech into the home of an unwilling listener"); *Rowan v. United States Post Office*, 397 U.S. 728, 737 (1970) (holding that a regulation permitting a householder to insulate himself from material that the householder found "erotically arousing or sexually provocative" is valid because "the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer"). In *Rowan*, this Court balanced "the right of every person 'to be let alone' * * * in the scales with the right of others to communicate" and found that "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Id.* at 736-37.

Relying on the principles embodied in these cases, the Seventh Circuit held that Paragraph 70-51(d) was a valid limitation on petitioners' commercial speech rights. *Curtis*, 840 F.2d at 1300-04; *see also South Suburban*, 935 F.2d at 890-94. There is no conflict between the Sixth and Seventh Circuit Courts of Appeals.

B. Illinois' Anti-Solicitation Statute Gives Realtors Clear Direction On How To Comply—Remove The Addressee's Name From Their Mailing List.

Petitioners also challenge the Illinois statute on vagueness grounds. However, there is no risk of error if the broker simply removes the addressee's name from his or her mailing list. *Curtis*, 840 F.2d at 1304 n.12; *see also Rowan*, 397 U.S. at 740.

South Suburban directly answers petitioners' challenge here. The *South Suburban* decision reviewed the vagueness analysis in *Curtis* and agreed that Paragraph 70-51(d) met due process requirements. The Seventh Circuit rejected claims that a theoretical overlap into such things as "an exchange of business cards, a friendly chat while showing homes in a neighborhood, introducing new neighbors, or the announcement of the opening of a new office," made the statute invalid on vagueness grounds. 935 F.2d at 894-95 & n.19.

Petitioners suggest that the Cook County State's Attorney's Office frequently prosecutes real estate professionals for "general goodwill and other advertising that does not attempt to induce anyone to sell or list property." Petition For Writ Of Certiorari at 14. Contrary to petitioners' suggestion, this "general goodwill advertising" includes language which could reasonably be construed as solicitations for home sales. (*See e.g.*, R-80, exs. 1r, 2c, 4b, 8a, 8b.) Thus, petitioners' complaint that Paragraph 70-51(d) produces standardless prosecutions lacks merit.

C. Contrary To Petitioners' Assertions, The Purposes Of The Illinois Anti-Solicitation Statute Are To Protect Against Unethical Real Estate Practices Such As Blockbusting, And In Recent Times, To Protect The Interest In Residential Privacy.

Petitioners repeatedly argue that the Illinois General Assembly intended Paragraph 70-51(d) to foster racial segregation; to "single out a discrete group of speakers" for discriminatory treatment because these speakers "assist black homeseekers to find housing in predominantly white communities." Petition For Writ Of Certiorari at 12. Contrary to petitioners' assertions, Paragraph 70-51(d) was never intended to discriminate against black homeseekers. Paragraph 70-51(d) was enacted to combat unethical real estate activities such as blockbusting. *People v. C. Betts Realtors, Inc.*, 66 Ill. 2d 144, 149, 361 N.E.2d 581, 583-84 (1977); *People v. Beaulieu Realtors, Inc.*, 144 Ill. App. 3d 580, 586, 494 N.E.2d 504, 509 (1st Dist. 1986). The court in *Curtis* recognized that the statute currently served this important interest in privacy:

> In this case, the narrowness of the statute is the result of its attempt to achieve its primary purpose of preventing blockbusting. But the privacy interests now directly and narrowly served by § 70-51(d) operate to justify the very limited infringement upon the First Amendment rights of sellers of real estate.

840 F.2d at 1303 n.10. Paragraph 70-51(d) serves important state interests of preventing unethical real estate practices such as blockbusting and protecting residential privacy.

II.

THE ILLINOIS ANTI-SOLICITATION STATUTE MEETS ALL OF THE *CENTRAL HUDSON* REQUIREMENTS FOR REGULATING COMMERCIAL SPEECH.

Petitioners challenge the privacy interest as a valid purpose for regulating commercial real estate advertising. The Seventh Circuit decisions correctly found that Paragraph 70-51(d) satisfied the requirements for regulating commercial speech as laid out in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), and its progeny. Paragraph 70-51(d) is a valid regulation of commercial real estate advertising.

Petitioners attempt to deny the vitality of Paragraph 70-51(d) by arguing that it was not the original intention of the lawmakers to protect the privacy interest. Yet, even the dissent in *Curtis* acknowledged that

> [t]he majority correctly notes that the government may assert in defense of the statute an interest other than that which prompted the original enactment of the statute. *See Bolger v. Youngs Drug Prods.*, 463 U.S. 60, 71, 103 S. Ct. 2875, 2883, 77 L. Ed. 2d 469 (1983); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460, 98 S. Ct. 1912, 1921, 56 L. Ed. 2d 444 (1978); *Doe v. Bolton*, 410 U.S. 179, 190-91, 93 S. Ct. 739, 746-47, 35 L. Ed. 2d 201 (1973).

840 F.2d at 1307 (Ripple, J., dissenting).

Paragraph 70-51(d) also meets the other requirements of the *Central Hudson* test. *See* 447 U.S. at 566. The regulation directly advances the interest in protecting residential privacy:

> [T]he regulation in issue meets the *Central Hudson* test because it directly advances the goal of ensuring privacy in the home. As was the case in *Rowan*, once a homeowner expresses his or her desire not

> to receive certain types of literature he or she determines to be objectionable, there simply is no further right to press those ideas on the unwilling recipient.

Curtis, 840 F.2d at 1302 (footnote omitted). The statute is also narrowly tailored to achieve the goal of protecting residential privacy. Since "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides," (*Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)), the prohibition on solicitations to those who have given notice that they do not wish to be solicited fittingly serves the privacy interest.

The unanimous panel in *South Suburban* rejected petitioners' suggestion that the privacy interest may not be used to insulate homeowners from only one category of commercial speech: "Regardless of whether a single mailer or an entire class of mailers are involved, 'a mailer's right to communicate must stop at the mailbox of an unreceptive addressee.' " 935 F.2d at 894 (quoting *Rowan*, 397 U.S. at 736-37).

A valid regulation promoting the interest in privacy protects "the right of every person 'to be let alone' " and shields the "unreceptive addressee" from "unwanted communication, whatever its merit." *Rowan*, 397 U.S. at 736, 737. "Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom." *Frisby*, 487 U.S. at 485 (citations omitted). Whether the speech is commercial speech with its "qualified, but nonetheless substantial protection" (*Bolger*, 463 U.S. at 68), or "core" First Amendment speech subject to "careful scrutiny" (*Frisby*, 487 U.S. at 479), the privacy interest,

and more particularly the interest in residential privacy, is amply sufficient to sustain a ban on speech. *See Frisby, supra,* 487 U.S. 474 (1988); *National Funeral Services, Inc. v. Rockefeller,* 870 F.2d 136 (4th Cir. 1989) (holding that a West Virginia statute which bans in-person and telephonic solicitations for preneed funeral contracts to prospective purchasers in nursing homes, hospitals and private residences, as well as to relatives of persons near death, is a valid regulation based, in part, on the interest in residential privacy).

III.

PETITIONERS' COMPLAINT WAS PROPERLY DISMISSED WHERE THE SEVENTH CIRCUIT HELD THAT PETITIONERS' CLAIMS WERE INSUFFICIENT AS A MATTER OF LAW.

Petitioners finally request an order reversing the decisions of the lower courts in this case so that they may obtain a trial on the merits of their claims. But they are not entitled to a trial. In *Curtis,* the Seventh Circuit found that petitioners' complaint was insufficient as a matter of law. 840 F.2d at 1296-97. The court expressly recounted this holding in its second decision in this case, *Pearson v. Thompson.* (App. pp. 2-4.) On the second review, it became petitioners' burden to prove that *Curtis* should not be the law of the case. They did not meet their burden of proof and the Seventh Circuit affirmed the dismissal of the complaint. (App. p. 4.)

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Writ of Certiorari to the Seventh Circuit Court of Appeals.

Respectfully submitted,

ROLAND W. BURRIS
Attorney General, State of Illinois

ROSALYN B. KAPLAN
Solicitor General, State of Illinois

RITA M. NOVAK
Counsel of Record
ROBERT G. TOEWS
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2193

Attorneys for Respondents